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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, *Appellants*,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT No. 5 IN THE COUNTY OF ARAPAHOE AND STATE OF COLORADO, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS

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MOTION TO DISMISS

Appellees, City and County of Denver, State of Colorado and The Cherry Creek School District No. 5 move to dismiss the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial federal question is involved herein.

Question Presented

Whether Denver is proscribed by the due process and equal protection clauses of the 14th Amendment to the United States Constitution from accepting as provided by Colorado law, a voluntary annexation petition from landowners of a tract of land under annexation provisions which have been upheld by the Colorado Supreme Court because it refused an election requested by nonqualified landowners.

Statement of the Case

Annexation in Colorado is initiated on a voluntary basis by landowners in the area seeking annexation. A written petition signed by the owners of more than fifty percent of the area seeking annexation who shall also comprise a majority of the landowners residing in the territory at the time the petition is filed must be presented to the legislative body of the city, city and county or incorporated town to which annexation is sought. (Colorado Revised Statutes, 1963, Section 139-10-3)

Landowners are defined as ". . . owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year become liable for a property tax thereon; . . .". (C.R.S., 1963, 139-10-8)

An election is required if a written counter-petition is filed with the municipality to which the territory is pro-

posed to be annexed. Such counter-petition must be filed within thirty days of the first publication of notice of the petition seeking annexation and must be executed by persons who would have been qualified to sign the petition for annexation, in a number of not less than two thirds of the number of signatures on the petition. Signers of the petition may also sign the counter-petition (C.R.S., 1963, 139-10-4(2).

On December 31, 1964, owners of land in Arapahoe County, Colorado, contiguous to the City and County of Denver, an area eligible for annexation, applied to the City Council of the City and County of Denver for annexation.

Appellant Rogers and others similarly situated thereafter signed a counter-petition. The counter-petition was rejected by the City Council of Denver because it did not include the required number of signatures. The signatures of Appellant Rogers, and others similarly situated, were rejected by the city council because they did not possess the statutory requirement of being "a landowner". Appellants had not been "owners in fee of real property in the territory proposed to be annexed who have in the next preceding calendar year (to the date of the Petition, i.e. 1963) become liable for a property tax thereon."

The City Council of the City and County of Denver thereafter, pursuant to the statutory procedure, passed an ordinance of annexation whereby the property proposed by the landowners for annexation was annexed to the City and County of Denver. (Ordinance No. 57, Series 1965, effective March 20, 1965)

Appellants did not and do not challenge the regularity and validity of the annexation procedure. Indeed Appellants admit that all the annexation procedures and standards provided by Colorado Revised Statutes, 1963, Sections 139-10-1 et seq. have been fully complied with and adhered

to by both the petitioners for annexation and the City and County of Denver (R. 52-55). Appellants challenge the annexation on the sole basis that their counter-petition should have forced an election and that the statutory definition of "landowners", with which they did not comply, is "unreasonably arbitrary" and constitutes "discriminatory classification" in violation of the due process and equal protection clauses of the United States Constitution.

The Supreme Court of Colorado, En Banc, in a unanimous opinion affirmed the Judgment of the District Court In And For the County of Arapahoe, and held the annexation valid. In holding that there was no violation of Appellants' rights under the Constitution of the State of Colorado and that the definitions in the statute are a matter for determination by the Colorado General Assembly and that they are not unreasonably arbitrary or discriminatory, the Court affirmed past precedent in Colorado and the principle that "in the absence of express constitutional provisions to the contrary, the power of a state legislature over the boundaries of the municipalities of the state is plenary." (419 P. 2d 648, 649)

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal.

1. *Annexation Procedure A Matter Of State Law.*

This Court has consistently recognized the plenary power of the state to expand or contract the territorial area of its political subdivisions. This Court in *Hunter* v. *Pittsburgh* 207 U.S. 161, 179, held:

> "All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State

is supreme and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

2. *Appellants Concede Annexation According To State Law.*

Appellants herein concede, as indeed they must, that the annexation procedure and standards provided by Colorado Revised Statutes, 1963, Sections 139-10-1 et seq. have been fully complied with by both the petitioners for annexation and the City and County of Denver. (R. 52-55). Appellants further concede that the annexation procedure is not "merely unconstitutional, improvident or an abuse of discretion by the Legislature" (Jurisdictional Statement p. 7). Appellants' only challenge is that the legislation upon its merits represents an unconstitutional deprivation of guaranteed rights against unreasonably arbitrary and discriminatory classifications, an invidious discrimination. Such a challenge made in a vacuum and without specificity is without merit and raises no federal question. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179; *Kelly* v. *Pittsburgh*, 104 U.S. 78, 80, 81; and see other cases cited at 207 U.S. 178.

In 1893, the Colorado Supreme Court in *Mayor* v. *Shat-*

tuck, 19 Colo. 104, 34 Pac. 947, 949 (1893) held that the legislature has plenary power over municipal corporations. In so holding, the Court upheld a legislative classification as presented here, restricting annexation elections to "tax paying electors" as opposed to electors who paid no real property tax. The Court said (Id. at 950) "In the absence of any specific constitutional provision to the contrary, the legislature may choose any appropriate agency whereby to change, modify or disincorporate municipal corporations", and added "We find nowhere in the constitution any provision forbidding the submission of the question of dissolution or annexation to the determination of tax-paying electors". This construction of a state constitution is binding upon this Court. *Jefferson Branch Bank* v. *Shelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 71.

3. *Classification Not Arbitrary Or Unreasonable.*

The Colorado Supreme Court has for some seventy years considered that the people themselves had the right to set up a separate classification restricting annexation elections to "tax paying electors." *Mayor* v. *Shattuck*, 19 Colo. 104, 34 Pac. 947, 950 (1893).

It has long been settled that a classification, even though discriminatory is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U.S. 522, 528. The limitation on the rights of individuals to question legislative action in judicial proceedings where standing is predicated on the status of taxpayer has long been recognized. *Massachusetts* v. *Mellon*, 262 U.S. 447, 487.

As stated by the Colorado Supreme Court, (Jurisdictional Statement 13)

"Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory."

The Supreme Court of Alaska passing upon a similar problem in *Fairview Public Utility District* v. *City of Anchorage*, 368 P. 2d 540, 546 (Alaska 1962), appeal dismissed and cert. denied, 371 U.S. 5, stated:

> "Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just the local community. There has been no infringement or deprivation of rights protected by the Fourteenth Amendment."

Appellants cite no relevant case [1] nor do they allege any specific discrimination other than the fact that they were not qualified as "landowners" to compel an election on the annexation. The Colorado Supreme Court, found no such right vested in Appellants by either the laws of Colorado or the Constitution of the United States.

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[1] *Gomillion* v. *Lightfoot*, 364 U.S. 339, involved changing boundaries, race discrimination and the Fifteenth Amendment; *Munn* v. *Illinois*, 94 U.S. 113, upheld the establishment of charges for the storage of grain; *Lucas* v. *Forty Fourth General Assembly*, 377 U.S. 713, involved apportionment of the Colorado Legislature; *Eubank* v. *Richmond*, 226 U.S. 137, an unreasonable exercise of the municipal police power for establishing building lines; *McCabe* v. *Atcheson*, etc. R. Co., 235 U.S. 151, involved the Oklahoma "separate coach law"; and *In re Oregon Tunnel Dist. No. 1*, 253 Pac. 1 (Oreg. 1927) involved a local improvement district for benefit taxation which excluded landowners holding less than 5,000 sq. ft. of property from voting but not from the tax burdens.

4. Arapahoe County, And Its Officials, Have No Fourteenth Amendment Rights They Can Maintain Against The State of Colorado.

The Complaint in this case by the Board of County Commissioners Of the County Of Arapahoe against the exercise of political power by the State of Colorado, through its Constitution and a properly adopted statute, is plainly without merit.

The Supreme Court of Colorado has held that counties are merely subdivisions of the State and their powers are limited to those specifically granted by the State. *Colburn* v. *Board of County Commisioners of El Paso County,* 15 Colo. App. 90, 61 Pac. 241, 243 (1900).

The rights exercised over the area within its boundaries by the county are political rights—also the power is a political power. Neither the county nor the inhabitants of the county possess vested property rights in the county system, in the county government, or in the county boundaries, nor a right to live in any particular county of the state. The right here is not a vested property right of a person against his government which is protected by the Constitution of the United States. A political right conferred by law upon a subdivision of the state is not a vested right against the government, which, in this case, because it involves the state Constitution, is the people themselves.

The equal protection clause was not designed to insulate state instrumentalities, such as counties, from state action, and as counties they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in op-

position to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U.S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U.S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343. "... [T]he Equal Protection Clause relates to equality between persons as such, rather than between areas" and "territorial uniformity is not a constitutional requisite." *McGowan* v. *Maryland*, 366 U.S. 420, 427. Nor do the Appellants as individuals have any contract right to the continued maintenance of their county or its powers in unaltered form. *Hunter* v. *Pittsburgh, supra.*

Conclusion

For the foregoing reasons, the appeal should be dismissed as no substantial federal question is presented herein.

Respectfully submitted,

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